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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1963

NO. 600

ARCHIE A. WHITE,
Respondent,

vs.

WARD LANE as Warden of the Indiana State Prison,
Petitioner.

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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THE OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported as *Archie A. White* v. *Ward Lane*, (7th. Cir. July 17, 1963), — F.2d —, No. 14004. It is reprinted in full as an appendix to this petition.

The overruling of the Petition for Rehearing and the dissenting opinion thereto are reported as *Archie A. White*

v. *Ward Lane* (7th Cir. August 20, 1963), — F.2d —, No. 14004. The Court's ruling and the dissenting opinion are reprinted in full as an appendix to this petition.

The ruling of the United States District Court for the Northern District of Indiana is unreported and is printed in full as an appendix to this petition.

The ruling of the Indiana Supreme Court on Respondent's attempted appeal from the denial of his Coram Nobis petition is reported as *White* v. *State* (1959), 239 Ind. 710, 159 N.E. (2d) 388. This per curiam opinion is reprinted in full as an appendix to this petition.

The ruling of the Indiana Supreme Court on Respondent's Petition for Rehearing on his appeal from the denial of his Coram Nobis petition is reported as *White* v. *State* (1959), 240 Ind. 697, 162 N.E. (2d) 677. This per curiam opinion is reprinted in full as an appendix to this petition.

Respondent's first Petition for Certiorari filed in the United States Supreme Court is reported as *White* v. *Indiana* (1960), 362 U.S. 981. This petition was denied without opinion.

Respondent's second Petition for Certiorari filed in the Supreme Court of the United States is reported as *White* v. *Indiana* (1962), 368 U.S. 970. This petition was denied without opinion.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 17, 1963.

The Petition for Rehearing was overruled on August 20, 1963.

THE STATUTE CONFERRING THIS COURT'S JURISDICTION OVER THIS PETITION

This Court's jurisdiction over this petition for Certiorari is conferred by Title 28, Section 2101, of the United States Judicial Code, which authorizes this Court to grant certiorari to review judgments of United States Courts of Appeal on petitions filed within ninety (90) days from the date of entry of such judgment.

THE QUESTIONS PRESENTED

The questions are:

1. Can a Federal Circuit Court in a habeas corpus proceeding ignore procedural rules of a State for the prosecution of a direct appeal in the State Court when there is no showing that those State procedural rules denied any substantive right to the petitioner; and, further, grant a remedy of direct appeal in the State court when the petitioner did not request it?

2. Does Respondent have the additional State remedy of a Belated Appeal or right to file a petition to file a Belated Motion for New Trial in Indiana?

3. Can a Federal Circuit Court accept, as true, the fact allegations in a Habeas Corpus petition when the District Court dismissed the petition in the District Court without further pleading, or a hearing on the grounds that the State remedies had not been exhausted?

THE FEDERAL AND STATE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The applicable constitutional and statutory provisions involved in this appeal are as follows:

1. Section of the Fourteenth Amendment to the United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Indiana Public Defender Act reads in relevant part as follows:

2. Indiana Acts 1945, Ch. 38, Sec. 1, as found in Burns' Indiana Statutes, Section 13-1401:

"There is hereby created the office of Public Defender. The public defender shall be appointed by the Supreme Court of the State of Indiana to serve at the pleasure of said court, for a term of four [4] years. He shall be a resident of the state of Indiana and a practicing lawyer of this state for at least three [3] years. The Supreme Court is authorized to give such tests as it may deem proper to determine the fitness of any applicant for appointment."

3. Indiana Acts 1945, Ch. 38, Sec. 2, as found in Burns', Section 13-1402:

"It shall be the duty of the public defender to represent any person in any penal institution of this state who is without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired."

4. Indiana Acts 1945, Ch. 38, Sec. 5, as found in Burns', Section 13-1405:

"The public defender may order on behalf of any prisoner he represents a transcript of any court proceeding, including evidence presented, had against any prisoner, and depositions, if necessary, at the expense of the state, but the public defender shall have authority to stipulate facts contained in the record of any court, or the substance of testimony presented or evidence heard involving any issue to be presented on behalf of any prisoner, without the same being fully transcribed."

The Indiana Belated Appeal Statute is:

Indiana Acts 1947, Ch. 189, Sec. 5, as found in Burns', Section 9-3305:

"The Supreme Court of Indiana may, for good cause shown, under such rules as it may adopt or under such orders as it may make in a particular case, permit appeals from a judgment of conviction after the original time for taking an appeal has elapsed."

Rule 2-40 of the Indiana Supreme Court adopted September 11, 1963, reads as follows:

"Hereafter, no court shall have jurisdiction to entertain any action for a writ of error coram nobis in any criminal case, but the remedy heretofore granted in such a proceeding shall hereafter be obtained solely through a motion for a new trial in the case of which the cause therefor is alleged to have originated. Each ground shall be separately specified in the motion for a new trial, and any ground or error not so specified shall be considered waived.

"Trial counsel representing a defendant or the defendant pro se shall, in all cases where meritorious grounds exist therefor, file a motion for a new trial within the time prescribed by the rules of this court. If no timely motion for a new trial is filed by a defend-

ant's trial counsel or by the defendant pro se, it may be considered as evidence by the court that no meritorious grounds exist for a new trial or for an appeal, or if any meritorious grounds did exist, there is an acquiescence in, and an acceptance of, the judgment of the trial court by the defendant.

"Time limitations with reference to motions for a new trial shall be applicable hereto. Provided, however, if the moving party first obtains knowledge of an alleged ground after the time within which a motion for a new trial may be filed, such party may file a petition requesting permission to file a belated motion for a new trial, which motion shall be attached to said petition. Not more than one belated motion for a new trial in the same case may be entertained or considered by a court unless the subject matter of the action had not come or could not come by the exercise of diligence to the knowledge of the petitioner at the time of the filing of such belated motion for a new trial. The petition (for a belated motion for a new trial) must be personally verified by the party, specifically alleging when the cause was first discovered, how it was discovered, the facts showing the cause, and why such cause could not have been discovered before by the exercise of due diligence. The court, upon finding substantial evidence of such facts, and that the movant acted as promptly as reasonably possible, shall approve the filing of said belated motion for a new trial.

"The Attorney General of the State of Indiana and the Prosecuting Attorney of the judicial district where in such petition is filed shall be given notice of the filing of the petition and thirty (30) days' time within which to answer same. A copy of the petition shall be served with the notice.

"In the event a belated motion for new trial is filed in forma pauperis, it shall be the duty of the Public Defender of the State of Indiana to represent the peti

tioner in said proceedings, if he, after diligent inquiry, finds merit thereto, subject, however, to the provisions of Rule 2-40A infra.

"Affidavits may be filed with and in support of or in opposition to petitions for belated motions for new trials and motions for new trials and shall be considered as evidence without introduction thereof. The court may hear additional evidence at its discretion. The petition and affidavits filed in support thereof or in opposition thereto shall be a part of the record without a bill of exceptions. The parties thereto shall not be entitled to a change of venue from the county or change of judge.

"This rule shall be applicable only to criminal proceedings."

Rule 2-40A of the Indiana Supreme Court, adopted September 11, 1963, reads as follows:

"Rulings on petitions to file belated appeals, rulings on petitions to file belated motions for a new trial and rulings on belated motions for new trial (when because of the expiration of time it is impossible to incorporate the alleged errors in a regular appeal in the original criminal case), may be reviewed only on petition for a writ of certiorari in the Supreme Court of this state.

"A petition for a writ of certiorari shall be verified, shall set forth specifically the grounds therefor and may be supported by a brief. A copy of the petition and brief shall be served on the Attorney General at the time of filing. To this petition the Attorney General shall file a response under oath admitting, denying or stating additional facts (by affidavit or otherwise) pertaining to the issue involved, together with brief in support thereof. If there is a conflict as to the statement of the record below, this court may direct the

clerk below to prepare a certified copy of that portion of the record in dispute and file the same in this court.

"If the conflict concerns the evidence, the trial court may be directed to recite in narrative form the evidence pertinent to the issue and certify to the same as a bill of exceptions containing all of the evidence pertaining to the issue involved.

"It shall be the duty of the Public Defender of the State of Indiana to represent indigent persons who are inmates of penal institutions of the State of Indiana after their time for regular or timely appeal has expired, if requested so to do, in the filing of petitions for delayed appeals, petitions for belated motions for a new trial, and petitions for writs of certiorari if he, after diligent inquiry, finds any grounds upon which to sustain such proceedings. In the event of the failure or refusal of the Public Defender to represent any petitioner in such cases (as provided in Rule 2-40B, supra), upon petition filed in the clerk's office of the Supreme Court setting up such facts that the Public Defender has failed or refused to represent them, a citation shall be issued to the Public Defender by this court to show cause why he does not represent the petitioner, and he shall file his response and report with the clerk of this court, which shall become a part of the record in this cause. Upon due consideration of said response and report, the court shall determine whether or not an order shall issue requiring the Public Defender to represent the petitioner.

"In the event the proceedings are in forma pauperis, no costs shall be taxed against petition for transcripts, bills of exceptions and certified copies of the record in such case; otherwise the costs shall be taxed as provided by law.

"The petition and brief for writ of certiorari shall be filed with sixty (60) days after the ruling complained of, and the response thereto within thirty (30) days

after the filing of the petition for the writ. The petitioner may file a reply brief within ten (10) days after the filing of the response. No other briefs or pleadings shall be filed. Six (6) copies of the petition and brief, and response and the reply brief shall be filed with the clerk.

"The court may grant the writ if it finds meritorious grounds for a review of the trial court's action exist, and make such order, final or otherwise, as may be appropriate.

"Provided further, that where the petitioner for the writ does not meet with the rules of this court, the same may be denied under the same circumstances, conditions and for the same reasons given, if any, by the United States Supreme Court in denying like petitions.

"This rule shall be applicable only to criminal proceedings.

"These rules, because of an emergency, shall become effective immediately.

"Dated this 11th day of September 1963."

CONCISE STATEMENT OF THE CASE

A

NATURE OF THE CASE AND ITS DISPOSITION IN THE DISTRICT AND APPELLATE COURTS

This action commenced as a Petition for Writ of Habeas Corpus brought on March 2, 1962, by Respondent, to contest the legality of his detention in the Indiana State Prison by Warden, Ward Lane. (All references to the record will be to Respondent's Appendix as filed in the court below; nine [9] copies of which have been filed with this petition. Appendix, page 1 as A-p. 1.) Without any plead

ings having been filed by the State, or hearing being held, the District Court denied Respondent's Petition for Writ of Habeas Corpus on that grounds that he had not exhausted his State remedies, "namely a belated appeal, Burns' Indiana Statutes (1956 Repl.), Sec. 9-3305." (A-p. 16.)

The District Court then denied Respondent's request for a Certificate of Probable Cause on the following grounds:

"IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

"ARCHIE A. WHITE
PETITIONER
VS.
WARD LANE, WARDEN
INDIANA STATE PRISON
RESPONDENT
CIVIL NO. 3010

"ORDER

"Petitioner has filed a request for a Certificate of Probable Cause so that he can appeal from this Court's Order of June 15, 1962, denying his Petition for Writ of Habeas Corpus. 28 U.S.C.A. § 2253.

"Petitioner alleges that his case is similar to the facts in this Court's decision in *Brown* vs. *Lane*, 196 F. Supp. 484 (D.C.N.D. Ind. 1961). However, it must be remembered that Mr. Brown had exhausted all his available remedies in the State Court of Indiana before he came into this Court. This petitioner has not exhausted his remedies, nor does he indicate to this Court any grounds upon which relief could be granted.

"For the reasons set out in this Court's Order of June 15, 1962, it is clear that there is no probable cause existing for the appeal that petitioner seeks to perfect.

"IT IS THEREFORE THE ORDER OF THIS COURT THAT petitioner's request for a Writ of Probable Cause be, and the same is, hereby, denied.

"/s/ Robert A. Grant
JUDGE

"ENTER: Sep. 28, 1962."

On November 23, 1962, the United States Court of Appeals for the Seventh Circuit granted Respondent herein leave to proceed in forma pauperis and appeal the denial of his Writ of Habeas Corpus. The Court also appointed counsel for Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

Respondent's Petition for Writ of Habeas Corpus reveals the following fact situation. Respondent was convicted of incest on January 28, 1957, in the Harrison County, Indiana Circuit Court. (A-p. 4.) The trial was had before a jury and Appellant was represented by counsel. (A-p. 11.) Respondent's petition alleges—although this fact was never litigated in the District Court—that when his attorney asked him if he wanted to appeal his case, Respondent answered in the affirmative and his attorney said he would appeal it for him. (A-p. 11.) No direct appeal was ever prosecuted from Respondent's original conviction.

Sometime after his conviction, but before he took any further action, Respondent sought the assistance of the Public Defender. The Public Defender, through his Deputy, Thomas A. Hoadley, declined to assist Respondent, presumably in a belated appeal as his time for taking a regular

appeal had expired, saying there "* * * are neither procedural or evidentiary errors in your record of trial upon which to base an appeal." (A-p. 13.) This statement was contained in a letter sent to Appellant on July 16, 1957. (A-p. 13.) The Public Defender told Respondent to file a belated motion for new trial and belated appeal. (A-p 13.) Respondent did neither.

On or about January 31, 1958, Respondent filed a Writ of Error Coram Nobis in the Harrison County Circuit Court. (A-p. 4.) The Public Defender was apparently not asked to assist him in the preparation or filing of the Writ. After several pleadings, Respondent's Petition for Writ of Error Coram Nobis was denied on or about December 8, 1958. (A-p. 6.) The contents of the Petition for Writ of Error Coram Nobis are not set out in the record, nor is it clear from the record what questions were raised by the Writ.

On or about December 23, 1958, Respondent filed a Petition for an Appeal as a Poor Person in the Harrison Circuit Court. (A-p. 6.) Respondent then filed in the Supreme Court of Indiana on or about April 8, 1959, a "Motion Nonesuit (Appeal) * * *." So Petitioner could appeal the Harrison Circuit Court decision in the Indiana Supreme Court." (A-p. 6.) Apparently, this was an attempt to appeal the denial of the Coram Nobis Writ, as the Petition to Appeal as a Poor Person was not acted upon. (A-p. 6.) The Supreme Court of Indiana, in a Per Curiam Opinion, denied Respondent's petition on June 29, 1959. The Court treated the petition as an attempted appeal from the Coram Nobis denial and denied it as not being timely filed under Indiana Supreme Court Rule 2-2.

White v. *State* (1959), 239 Ind. 710, 159 N.E. (2d) 388.

On or about September 4, 1959, Respondent filed in the Indiana Supreme Court a "Motion for Review on Motion Nonesuit (Appeal)." (A-p. 7.) The Indiana Supreme Court treated this pleading as a petition for rehearing and dismissed it for failure to timely file it pursuant to Indiana Supreme Court Rule 2-22.

White v. *State* (1959), 240 Ind. 697, 162 N.E. (2d) 677.

Respondent then filed a Petition for Writ of Certiorari in the United States Supreme Court on March 7, 1960. (A-p. 7.) This was denied by the Supreme Court on May 16, 1960.

White v. *Indiana* (1960), 362 U.S. 981.

On July 1, 1960, Respondent filed in the Harrison Circuit Court a Verified Petition for Appointment of Counsel. (A-p. 7.) It is not stated for what purpose Respondent wanted this counsel. From the denial of this request, Respondent appealed to the Supreme Court of Indiana and his appeal was apparently finally denied on June 19, 1960. (A-p. 7.) [Petitioner has been unable to locate this denial in the reports.]

Respondent again filed a Petition for Writ of Certiorari in the Supreme Court of the United States which was also denied.

White v. *Indiana* (1962), 368 U.S. 970.

On March 2, 1962, Respondent filed his Petition for Writ of Habeas Corpus in the District Court for the Northern District of Indiana. (A-p. 1.)

It should be noted that after the Public Defender refused to represent Respondent, all his pleadings were filed pro se.

The sole basis on which Respondent's Writ of Habeas Corpus was denied was that Respondent had not exhausted his State remedies. (A-p. 15.)

REASONS FOR ALLOWANCE OF THE WRIT

Rule 19 (b) of the Supreme Court of the United States indicates that one of the considerations which this Court weighs in deciding whether to grant a Writ of Certiorari, is where a Federal Appellate Court has decided an important state question in conflict with applicable State law. Secondly, Rule 19 (b) indicates that this Court will also weigh a situation where a Federal Appellate Court has "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision." Petitioner respectfully submits that both these criteria apply in this case.

1. It would be difficult to overemphasize the importance of questions involving the rights of indigents in Indiana to appellate review after this Court's decision in *Lane* v. *Brown* (1963), 372 U.S. 477. The decision of the court below, while purportedly resting on *Lane* v. *Brown*, *supra*, in fact has little or nothing to do with that case. The decision below grants to Respondent a full appeal on the merits in the Supreme Court of Indiana from his conviction in the Harrison County Circuit Court.

Indiana law is clear on the time limits within which any convicted defendant must prosecute his appeal. A Motion for New Trial must be filed with the trial court within thirty (30) days from the time the verdict or decision is rendered.

> Indiana Acts 1880, Ch. 38, Sec. 422, as amended and as found in Burns' (1946 Repl.), Section 2-2403.

No such motion was ever filed.

Rule 2-2 of the Indiana Supreme Court states in part:

> "In all appeals and reviews the assignment of errors and transcript of the record must be filed in the office of the Clerk of Supreme Court within 90 days from the date of the judgment or the ruling on the motion for a new trial, * * * ".

No such transcript was ever filed. Further, Respondent in his Petition for Writ of Habeas Corpus did not ask for a full appellate review of his original conviction, but only a review of the denial of his Petition for Writ of Error Coram Nobis. (A-p. 9.)

Thus, the Court of Appeals below has seen fit to totally ignore applicable State law and grant Respondent a right which, under State law, he did not possess, and which he understandably did not assert in the Federal Courts. *Lane v. Brown, supra*, does not so hold. It is submitted that if Indiana appellate procedure is to have any validity at all in a Federal court, this decision must be overturned and this Court should grant this petition.

2. The court below did not even go into the question of whether Respondent had exhausted his State remedies. The exhaustion doctrine was the basis of the decision in the District Court. Because the District Court did not feel

that Respondent had exhausted his State remedies, the Court dismissed the petition without ever reaching the merits of the petition. It is Petitioner's position that the District Court was clearly right and that Respondent had the remedy of belated appeal available to him in Indiana.

> Indiana Acts 1947, Ch. 189, Sec. 5, as found in Burns' (1956 Repl.), Section 9-3305.

Respondent now has the additional remedy in the State provided in Indiana Supreme Court Rule 2-40. (Reprinted *supra.*)

3. The decision of the Circuit Court assumes that all of the allegations of Respondent in his Petition for Certiorari are true and that Indiana, by operation of its law, has denied Petitioner his right to appeal. None of the fact allegations were ever litigated in the District Court. The District Court did not reach these allegations as it decided that the State remedies had not been exhausted. If the Circuit Court below decided that the District Court was in error and the State remedies had been exhausted, then at least that Court should have remanded the case for a hearing on the fact allegations in Respondent's petition. The State of Indiana has never had an opportunity to meet these allegations. The Circuit Court's decision sets a very dangerous precedent. A state prisoner henceforth could file a Petition for Writ of Habeas Corpus in a Federal District Court, knowing his State remedies were not exhausted, and then appeal the inevitable denial of his petition with the Circuit Court above considering the merits of his petition when those merits had never been litigated below.

CONCLUSION

Petitioner strongly urges that this Court grant certiorari in this case. The effect of the decision of the Seventh Circuit is to overrule or at least overlook Indiana's procedural rules relating to appeals. A wealthy petitioner would never be able to have a direct appeal granted, after the time for filing a motion for new trial had run, on the bare unproven allegation that his attorney had not taken an appeal after promising to do so. This decision thus denies to non-indigents equal protection.

The decision of the Supreme Court in *Lane v. Brown, supra*, was an attempt by this Court to see that indigents were treated in the same manner as non-indigents for purposes of appeal. It held nothing more. In the present case, the Seventh Circuit has held that indigents are to be given preferred treatment on appeal. There is no basis in either law or logic for such a holding.

For these reasons, Petitioner request this honorable court to grant Petitioner's Writ of Certiorari.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 14004 SEPTEMBER TERM, 1962 APRIL SESSION, 1963

ARCHIE A. WHITE,
Petitioner-Appellant,
v.
WARD LANE, as Warden of Indiana State Prison,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana.

July 17, 1963

Before SCHNACKENBERG, CASTLE and SWYGERT, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Archie A. White, petitioner, has appealed from an order of the district court entered June 15, 1962 which denied his petition for a writ of habeas corpus "for the reason that the petition fails to set forth facts showing that petitioner exhausted the remedies available to him in the courts of the State of Indiana: namely a belated appeal. Burns' Ann. Statutes § 9-3305 (1956 Repl.)."

The district court denied a certificate of probable cause, but this court on November 23, 1962 granted leave to proceed *in forma pauperis* on appeal, and appointed counsel to represent petitioner in this court.

The petition for habeas corpus which was denied by the district court avers that he was arrested by the sheriff of Harrison County, Indiana, on a charge of incest, and

the Harrison Circuit Court, on January 28, 1957, found him guilty and sentenced him to Indiana State Prison for not less than two years and not more than twenty-one years; and he is now confined in said prison.

It further appears therefrom that, on January 31, 1958, petitioner filed a petition for a writ of error coram nobis in the Harrison Circuit Court, which denied the petition on December 8, 1958; that he thereupon, on April 8, 1959, filed an appeal to the Indiana Supreme Court, which denied him relief for the reason that he failed to comply with rule 2-2 of said court, 1958 Edition, under which the time within which to perfect an appeal expired on February 2, 1959. (*White* v. *State*, 239 Ind. 710, 159 N. E. 2d 388; rehearing was denied. *White* v. *State*, 240 Ind. 697, 162 N. E. 2d 677; and the United States Supreme Court denied certiorari, *White* v. *Indiana*, 362 U. S. 981 (1960).)

It also appears therefrom that, on or about August 11, 1960, he filed an appeal to the Indiana Supreme Court from an adverse ruling on August 1, 1960 by the Harrison Circuit Court on his petition for appointment of counsel filed July 1, 1960. His appeal was denied on April 10, 1961, and a rehearing thereon was denied. The United States Supreme Court denied certiorari, 368 U. S. 970.

In answer to a letter which petitioner wrote, the chief justice of the Indiana Supreme Court on April 27, 1961, replied, *post* 3.

His petition for habeas corpus in the district court recited that the circuit court appointed James D. Williams as his counsel, and the public defender of Indiana refused to help petitioner in any manner.

In reference to his trial, petitioner stated that, after the jury brought in its verdict, attorney Williams asked if petitioner wanted him to appeal and that he told Williams, "Yes, because I am not guilty." He avers that Williams said "I will appeal it for you", but that is the last he heard from Williams.

Petitioner averred that, while confined in the state prison, he wrote the public defender of Indiana several letters

asking for help in appealing his conviction and the public defender declined to assist him.

He attached to his petition an alleged reply of the public defender, dated July 16, 1957, addressed to petitioner, which we set forth below:

> This is in answer to your letter of June 25, 1957. After reading your transcript of trial, we find the following evidence.
>
> (1) Tillie White, your wife, testified that she had been informed by her family that you had been having intercourse with your daughter and reported same to police;
>
> (2) Dr. Carl Dillman of Corydon testified that, in his opinion, your daughter had engaged in many (or several) sexual relations;
>
> (3) Your daughter, Etta White, testified that you had been having sexual relations with her once a week for the previous two (2) years; she was fifteen (15) years old at the time of the trial;
>
> (4) Dr. George Doyle, Louisville, Kentucky, testified that, in his opinion, your daughter was a competent witness.
>
> (5) You admitted at the trial that you played and scuffled with your daughter in bed at times prior to this charge.
>
> The best (and Only) way to attack this judgment is *first*, to *file a belated Motion for a new trial*, then *second, file a belated appeal to the Supreme Court of Indiana*. Harrison County will not furnish you with a pauper attorney to do this because your time for appeal has expired. *Our office will not help you* in any manner because there are neither procedural or evidentiary errors in your record of trial upon which to base an appeal. If there had been errors, your attorney would have appealed for you immediately after the trial.

> We shall return your transcript of trial to you; this office can do nothing further for you. (Italics supplied for emphasis.)

Petitioner alleged that on April 24, 1961, he wrote to the chief justice of the Indiana Supreme Court, "asking why Petitioner for Appointment of Counsel was denied on April 10, 1961", to which Chief Justice Arch N. Bobbitt replied on April 27, 1961, as follows:

> In reply to your letter of April 24, your Petition was denied on April 10 for the reason that you had not complied with Rules 2-5 and 2-6 of this Court, and for the further reason that the services of the Public Defender of Indiana are available to those prisoners who are unable to pay the cost of post-conviction legal procedures in all cases where there is merit to the appeal.
>
> If you are acting as your own lawyer, you must abide by the rules of Court the same as any other litigant.

Petitioner replied to the chief justice on May 4, 1961, saying in part:

> I have tryed to avail myself for the service of the Public Defender, the Public Defender has refused to help me, as the exhibit will show, further Rules 2-5 and 2-6 as you stated, I still do not know why I was denied my petition on April 10, 1961. I do not have lay books and do not have access to a law library.

1. Belated appeals are recognized by Burns' Indiana Statutes, Anno., Vol. 4, Part 1, § 9-3305 (1956 Repl.), which reads:

> **Supreme Court authorized to permit late appeals.**—The Supreme Court of Indiana may, for good cause shown, under such rules as it may adopt or under such orders as it may make in a particular case, permit appeals from a judgment of conviction after the original time for taking an appeal has elapsed.

2. In *Lane v. Brown*, 372 U. S. 477 (1963), the court considered the Indiana statutory provisions for a public defender, saying, at 479:

> "* * * In 1945 the Indiana Legislature enacted the so-called Public Defender Act, a law to deal with the problem of providing legal assistance to indigent prisoners in postconviction proceedings. It is the operation of the provisions of this law, as interpreted by the Supreme Court of Indiana, which we find constitutionally deficient in the present case.
>
> "The 1945 legislation created the office of Public Defender, to be appointed by the State Supreme Court, and, as later amended, authorized him to employ 'such deputies, stenographers or other clerical help as may be required to discharge his duties . . . .' The provisions of the law which are at the root of the problem in the case before us are those which define the Public Defender's basic duties and which authorize him to order hearing transcripts, or their equivalent, at public expense:
>
> > "'It shall be the duty of the public defender to represent any person in any penal institution of this state who is without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired.'
> >
> > "'The public defender may order on behalf of any prisoner he represents a transcript of any court proceeding, including evidence presented had against any prisoner, and depositions, if necessary, at the expense of the state, but the public defender shall have authority to stipulate facts contained in the record of any court, or the substance of testimony presented or evidence heard involving any issue to be presented on behalf of any prisoner, without the same being fully transcribed.'"

At 480, the court added:

"* * * The Indiana court has held that under the above-quoted provisions of the Public Defender Act, only the Public Defender can procure a transcript, of a *coram nobis* hearing for an indigent; an indigent cannot procure a transcript for himself and appeal *pro se*; nor can he secure the appointment of another lawyer to get the transcript and prosecute the appeal. *State ex rel. Casey* v. *Murray*, 231 Ind. 74, 106 N. E. 2d 911; *Jackson* v. *Reeves*, 238 Ind. 708, 153 N. E. 2d 604; *Willoughby* v. *State*, 242 Ind. 183, 177 N. E. 2d 465. The upshot is that a person with sufficient funds can appeal as of right to the Supreme Court of Indiana from the denial of a writ of error *coram nobis*, but an indigent can, at the will of the Public Defender, be entirely cut off from any appeal at all."

At 481, the court stated:

"* * * Brown requested the Public Defender to represent him in perfecting an appeal to the Indiana Supreme Court. This request was refused because of the Public Defender's stated belief than an appeal would be unsuccessful. * * *

"Brown finally instituted in the Federal District Court the habeas corpus proceedings we now review. * * *"

The Supreme Court, at 483, said:

"Both the District Court and the Court of Appeals were of the opinion that the issue in the present case is controlled by recent decisions of this Court which have held constitutionally invalid procedures of other States found substantially to deny indigent defendants the benefits of an existing system of appellate review.

We are in complete agreement."

The court then cited *Griffin* v. *Illinois*, 351 U. S. 12, *Burns* v. *Ohio*, 360 U. S. 252, *Smith* v. *Bennett*, 365 U. S. 708, and

Eskridge v. Washington Prison Board, 357 U. S. 214. The court held that *Lane v. Brown* fell clearly within the area staked out by these decisions, although it did not involve a direct appeal from a criminal conviction. However, it said that *Smith* makes clear that the *Griffin* principle also applies to state collateral proceedings and that Burns leaves no doubt that the principle applies, even though the state has already provided one review on the merits.

It pointed out at 485:

> "In *Eskridge* the Court held constitutionally invalid a provision which permitted a trial judge to prevent an indigent from taking an effective appeal. The provision before us confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all. Such a procedure, based on indigency alone, does not meet constitutional standards. We have no doubt that Indiana, with its historic concern for equal justice under law, will find no practical difficulty in correcting the constitutional deficiency which this case exposes."

It is obvious to us that petitioner has been unable to appeal from his conviction because of his indigency and that existing circumstances have rendered the state's corrective process ineffective to protect the rights of petitioner. Moreover, it is evident that it would be unrealistic to assume that the public defender may reasonably be expected to prosecute an appeal on behalf of petitioner. In such a situation, the Supreme Court of Indiana recognized in its order of April 23, 1963, in *Brown v. State of Indiana*, No. 0—604, that it may direct the trial court to appoint and furnish counsel for petitioner for an appeal to the Supreme Court of Indiana. This obligation has been recognized by that court in *State v. Hilgemann*, 218 Ind. 572, 576, 34 N. E. 2d 129, 131. It has been emphasized by the United States Supreme Court in *Douglas v. California*, 372 U. S. 353, as recently as March 18, 1963.

For these reasons the order of the district court is vacated and this case is remanded to that court, so that

appropriate orders may be entered ordering petitioner's discharge from the custody of respondent warden, unless within a reasonable time the State of Indiana provides petitioner an appeal on the merits from his conviction to the Supreme Court of Indiana and counsel to institute and prosecute said appeal.

We appointed attorney Porter R. Draper of the Indiana bar, to represent petitioner in this court. We commend and thank Mr. Draper for the able service he has rendered on behalf of petitioner.

ORDER VACATED and CASE REMANDED, WITH DIRECTIONS.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

In the

United States Court of Appeals

For the Seventh Circuit

No. 14004 SEPTEMBER TERM, 1962 APRIL SESSION, 1963

ARCHIE A. WHITE,
Petitioner-Appellant,
v.
WARD LANE, as Warden of Indiana State Prison,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana.

August 20, 1963

ON PETITION FOR REHEARING.

CASTLE, *Circuit Judge*, dissenting in part. It is my view that the petitioner should be afforded the same right to a belated appeal as Indiana extends to the non-indigent who has not perfected a timely appeal of his conviction. But that right is to review on belated appeal only "for good cause shown" therefor. Unless in a petition for belated appeal the petitioner is able to assert some error which, if found to exist, would require the reversal of his conviction, the Indiana Supreme Court should not be required to review his conviction.

I agree that the order of the District Court should be vacated but I would modify the scope of the directions on remand to the entry by the District Court of appropriate orders effecting the petitioner's discharge unless within

a reasonable time the State of Indiana provides counsel for petitioner for the purpose of presenting a petition in his behalf to the Supreme Court of Indiana for a belated appeal and prosecuting such appeal if allowed, and the Supreme Court of Indiana considers and determines such petition.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

In the

United States Court of Appeals

For the Seventh Circuit

Chicago 10, Illinois

No. 14004 — Friday, August 16, 1963

Before

Hon. Elmer J. Schnackenberg, *Circuit Judge*
Hon. Latham Castle, *Circuit Judge*
Hon. Luther M. Swygert, *Circuit Judge*

Archie A. White, *Petitioner-Appellant,* v. Ward Lane, as Warden, Indiana State Prison, *Respondent-Appellee.*	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

IT IS ORDERED by the Court that the petition for rehearing filed by appellee in the above entitled cause be, and the same is hereby DENIED.

IN THE

United States District Court

NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ARCHIE A. WHITE,
Petitioner,

v.

WARD LANE, as Warden of Indiana State Prison,
Respondent

CIVIL NO. 3910

ORDER

Petitioner's Motion for Appointment of Counsel is denied.

Petitioner contends that he has exhausted his State remedies in that:

(1) His court-appointed attorney did not prosecute an appeal of his conviction after he told petitioner he would do so;

(2) the Public Defender declined to represent petitioner;

(3) petitioner, proceeding pro se, was denied a Writ of Error Coram Nobis;

(4) the Indiana Supreme Court declined to review the denial because the appeal was filed too late, and

(5) the United States Supreme Court denied a Writ of Certiorari.

Petitioner does not allege the questions that were presented to the State Court in his petition for Writ of Error Coram Nobis; nor does he indicate what grounds he believes should have been presented on appeal of the conviction.

The petition for Writ of Habeas Corpus is denied for the reason that the petition fails to set forth facts showing that petitioner exhausted the remedies available to him in the courts of the State of Indiana, namely a belated appeal. Burns' Ann. Statutes § 9-3305 (1956 Repl.).

ROBERT GRANT,
Judge

Enter: June 15, 1962.

White v. *State of Indiana.*

[No. 0-559. Filed June 29, 1959.]

Archie White, petitioner, has filed a "Motion None Suit" which is deemed to be an appeal from a denial of a petition for writ of error coram nobis.

Petition denied.

Archie White, pro se.

PER CURIAM—Petitioner herein has filed, *pro se*, what he designates as "Motion None Suit" but which, from its contents, appears to be an attempt to appeal from the denial of a petition for writ of error coram nobis and will be treated as such.

The time within which to perfect an appeal from the denial of petitioner's petition for writ of error coram nobis expired on February 2, 1959. The petition herein was filed on April 8, 1959, hence, not within the time provided for filing appeals. See Rule 2-2 of this Court, 1958 Edition.

For the above reasons the petition herein must be denied.

Petition denied.

White v. *State of Indiana.*

[No. 0-578. Filed December 11, 1959.]

Archie White, petitioner, files petition for rehearing on denial of a certain petition in which he tried to appeal from a denial of petition for writ of error coram nobis.

Petition dismissed.

Archie White, pro se.

PER CURIAM: Petitioner herein seeks a rehearing on an order of this court entered on January 29, 1959, denying a certain petition in which he sought to appeal from the denial of a petition for writ of error coram nobis.

Rule 2-22 of this court, 1958 edition, requires that petitions for rehearing must be filed within twenty days from rendition of the decision. Since the petition herein was not filed until September 4, 1959, it must be dismissed for failure to comply with this rule.

Petition dismissed.

Achor, J., not participating because of illness.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1963

No. 600

ARCHIE A. WHITE,

Respondent,

vs.

WARD LANE, as Warden of the Indiana State Prison,

Petitioner.

Respondent's Brief In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1963

No. 600

ARCHIE A. WHITE,

Respondent,

vs.

WARD LANE, as Warden of the Indiana State Prison,

Petitioner.

Respondent's Brief In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

THE OPINIONS BELOW

The applicable opinions in the courts of inferior jurisdiction fully appear in the Petition for Writ of Certiorari.

JURISDICTION

The statute relied upon to confer jurisdiction upon the Supreme Court of the United States is set forth in the Petition for Writ of Certiorari. However, that statute is

qualified by Rule Nineteen (19) of the Rules of the Supreme Court of the United States impowering that Court to reject the said Petition in the exercise of sound judicial discretion.

FEDERAL AND STATE CONSTITUTIONAL PROVISIONS, RULES AND STATUTES INVOLVED

The following Constitutional and Statutory Provisions and Rules are intended to supplement those contained in the Petition for Writ of Certiorari.

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."
>
> Rule 19 (1), (b) Rules of the Supreme Court of the United States.

"An appeal to the Supreme Court or to the Appellate Court, may be taken by the defendant as a matter of right, from any judgment in a criminal action against him, in the manner and in the cases prescribed herein, and, upon the appeal, any decision of the court or intermediate order made in the progress of the case may be reviewed."

Ind. Acts, 1905, Ch. 169, §324, p. 584; 4 Burn's Ind. Stat. Anno. Pt. 1, 297, §9-2301.

"The motion for a new trial and the causes therefore shall be in writing. It must be filed within thirty (30) days from the date of the verdict or finding * * *"

Ind. Acts, 1905, Ch. 169, §282, p. 584; 4 Burn's Ind. Stat. Anno. Pt. 1, 244, §9-1903.

"No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin in tender of payment of debts; pass any bill of attainder; ex post facto law, or law impairing the obligation of contract or grant any title of nobility."

Article 10, §1, Constitution of the United States.

"No ex post facto law, or law impairing the obligation of contracts shall ever be passed."

Article 1, §24, Constitution of the State of Indiana.

QUESTIONS PRESENTED

Petitioner's delineation of the questions implicit in the instant case are satisfactory.

CONCISE STATEMENT OF THE CASE

Respondent accepts the statement of the case set forth in Petition for Writ of Certiorari.

ARGUMENT

I.

THE COURT OF APPEALS PROPERLY HELD INDIANA SUBSTANTIVE AND PROCEDURAL RULES DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW TO THE INDIGENT RESPONDENT

The Court of Appeals determined Respondent's rights guaranteed by the Fourteenth Amendment to the Constitution of the United States had been violated. In so doing they aptly determined a *pro se* mandatory or discretionary appeal does not equal such appeals prepared and prosecuted by counsel. Accordingly, another archaic legal fiction has been interred and should be permitted to rest. Attempted resurrection on the theory that Federal Courts lack authority to lay waste state substantive and procedural rules that deny Constitutionally guaranteed protection is without support in American jurisprudential precedent. Petitioner cites none and Respondent respectfully suggests none are available.

Respondent was convicted of the crime of incest and incarcerated. (A. p. 4) (All references to the record will be to Respondent's Appendix as filed in the Court below, copies of which were filed with the Petition for Writ of Certiorari. Reference to the Petition will appear as Pet. p. ....)

Irrespective of economic means, all persons convicted of a crime in Indiana are statutorily granted a right to appeal from that conviction.

Ind. Acts, 1905, Ch. 169, §324, p. 584; 4 Burn's Ind. Stat. Anno. Pt. 1, 297, §2301

Despite the request and assurance given to respondent, the Trial Court appointed pauper attorney failed to prosecute such an appeal (A. p. 9) within the thirty (30) day period provided for the filing of a motion for a new trial.

Ind. Acts, 1905, Ch. 169, §282, p. 584; 4 Burn's Ind. Stat. Anno. Pt. 1, 244 §9-1903.

The pauper attorney's determination not to appeal is unreviewable in the State of Indiana.

> "We must, therefore, assume that competent counsel assigned for trial would have filed a motion for a new trial if meritorious grounds therefore had existed, since such was his duty.
>
> Under the law of this state it is part of the duties of trial counsel whether representing a pauper defendant or not, to file a motion for a new trial if such counsel feels that there is meritorious grounds for a new trial and an appeal. In other words, trial counsel may not, upon the rendition of a verdict of the finding of guilty, walk out of the court room and shed himself of all responsibility with reference to the rights of his client, if, IN HIS OPINION, (Our Emphasis) the trial court has committed error which may be the basis for the motion for a new trial. We have no right to assume competent counsel would disregard such duty." *State ex rel Macon v. Orange Circuit Court*, __ Ind. __, 185 N.E. (2) 619, 621 (1962).

Consequently, Respondent was denied a mandatory appeal as a result of the failure of court appointed counsel to proceed. He had no control of that counsel whatsoever. Neither do the Indiana courts.

If mandatory appeal time expires, all convicted persons may seek a belated appeal as provided by statute.

Ind. Acts, 1947, Ch. 189, §5, p. 625; 4 Burn's Ind. Stat. Anno. Pt. 1, 375, §9-3305.

That remedy is patently discretionary with the Supreme Court of Indiana and subject to such rules as it may adopt or orders it may issue in a particular case.

The Court adopted no rules prior to the instant case. However, it had published written opinions requiring indigent convicted persons and only such poor persons to obtain legal assistance from the Public Defender as a condition precedent to prosecution of a belated appeal.

> "Petitioner's remedy, if he has one, is not through this Court, but the Office of the Public Defender, who is authorized by statute to furnish transcripts and act as pauper counsel in proper cases where appeal is taken after the regular time has expired." *Mooney v. State*, 239 Ind. 705; 187 N.E. (2d) 481 (1959).

However, the Public Defender may refuse to act as counsel and such a decision is unreviewable.

> "The Public Defender is not required to represent any person whose assertion that he is unlawfully in prison after the investigation, appears in his sound judgment to have no merit." *State ex rel Casey v. Murray*, 231 Ind. 74; 106 N.E. (2d) 911 (1952).

Respondent sought the aid of the Public Defender pursuant to that directive of the Supreme Court of Indiana. It was refused.

> "We shall return your transcript to trial to you; this office can do nothing for you."
>
> Letter to Respondent from Office of Public Defender, dated July 16, 1957 (A. pp. 13, 14).

A subsequent request that the trial court appoint a counsel was denied and an appeal to the Supreme Court of Indiana from that denial was dismissed. (Both Petitioner and Respondent are unable to find the report of that dismissal. See Pet. p. 13).

The reason for that dismissal was explained to Respondent by the then Chief Justice of the Supreme Court of Indiana, as follows:

> "In reply to your letter of April 24, your Petition was denied on April 10, for the reason that you had not complied with Rules 2-5 and 2-6 of this Court and for the further reason that the services of the Public Defender of Indiana are available to those prisoners who are unable to pay the cost of post-conviction legal procedures in all cases where there is merit to the appeal.
>
> If you are acting as your own lawyer you must abide by the Rules of Court the same as any other litigant."
>
> Letter of Chief Justice Arch N. Bobbitt to Respondent, dated April 27, 1961 (A. p. 14).

Therefore, Respondent was twice thwarted by indigency and indigency alone from prosecuting a mandatory or discretionary appeal.

A non-indigent can compel prosecution of a mandatory appeal. An indigent cannot. A non-indigent is not required to obtain the assistance of the Public Defender to prosecute a belated appeal. An indigent must. A non-indigent may employ any attorney to conduct a belated appeal. An indigent must abide by the unreviewable decision of the Public Defender and if assistance is withheld his only alternative is to proceed *pro se*.

Following complete briefing and oral argument, the Court of Appeals correctly held Respondent's Constitutional rights had been infringed. It then mandated his release if an appeal and counsel to prosecute that appeal were not furnished by the State of Indiana within a reasonable time. (Pet. 21-30).

The Supreme Court of the United States has consistently held such unreviewable determinations affecting the right to appeal granted indigents violates most fundamentally guaranteed due process and equal protection of the law.

Trial judges have been prohibited from preventing an indigent's appeal. *Eskridge v. Washington State Board of Prison Terms and Paroles*, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269; (1958); *Draper v. Washington*, 372 U.S. 47, __ S.Ct. __, 9 L.Ed.2d 698 (1963). States are forbidden to so intefere. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 335, 100 L.Ed. 891 (1956); *Burns v. Ohio*, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959); and Public Defenders cannot restrain the right to appeal. *Lane v. Brown*, 372 U.S. 477, __ S.Ct. __, 9 L.Ed.2d 892, (1963).

These prohibitions have been specifically applied to interference with an indigent's "statutorily granted right to appeal." In *Douglas v. California*, 372 U.S. 353, 83 S.Ct. __, 9 L.Ed.2d 811 (1963) the Supreme Court of the United States held that a determination by an Appellate Court to refuse appointment of counsel on the ground such appointment would not be helpful denied an indigent's "statutorily granted right to appeal" In the opinion the Court said:

> "When an indigent is forced to run this gauntlet of a preliminary showing of merit, the right to appeal is not adequate and effective. . . . The present case, where counsel was denied petitioner on appeal, shows that the discrimination is not between 'possibly good and obviously bad cases,' but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. Due process and equal protection demand that the poor man have the same rights as the rich man who appeals. As to him, [where] the court [appoints] counsel to act on his appeal, [proves] the benefit of counsel's assistance to [the] court, [after] full consideration of the merits of the appeal, [or] the case is [wholly] frivolous, [and] will so state in the record,

research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal."

The inevitable and proper result was the order to provide Pennell an appeal on the merits from his conviction.

The determination made by the Court of Appeals does involve an important question of Federal Constitutional Law which conflicts with the applicable decisions of the Indiana Courts. It does not, however, conflict with the decisions of the Supreme Court of the United States and neither is it such a departure by a lower Court as to call for an exercise of power of supervision in accordance with Rule 19 of Rules of the Supreme Court of the United States.

In truth the opinion of the Court of Appeals goes a long way toward bringing to fruition a statement made to Attorney General Brownell that:

> "So long as there is to be a government under and by law, we hold no doubt that the burden of prosecution is a community responsibility * * *. Equally, the burden of providing a fair trial is upon the community. The right to representation is a concomitant of fair trial, and though it is personal to the defendant and may vary with his choice and means, it cannot be permitted to fail just because the accused is a poor person. At that point the community must supply the deficiency." Representation of Indigent Defendants in Federal Cases: Hearing before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, February 17, 1954, p. 21. See also: Note 38 Ind. L. J. 623; The Indigent Defendant in the State Criminal Proceeding: *Betts v. Brady* Is Interred.

Surely, in this day and age this Court does not want to perpetuate the meaningless legal fiction that a *pro se* appeal equals an appeal prepared by counsel.

II.

INDIANA SUPREME COURT RULE 2-40A CONSTITUTES AN EX POST FACTO ENACTMENT IF APPLIED TO RESPONDENT

The Court of Appeals decision in the instant case was published July 17, 1963. The Petition for Rehearing was denied August 20, 1963.

On September 11, 1963, the Indiana Supreme Court adopted Rule 2-40A. This Rule requires that all Petitions for Belated Appeal may be reviewed only on Petition for Writ of Certiorari in the Supreme Court of Indiana. (Pet. p. 7).

Both Article X, Section 1 of the Constitution of the United States and Article I, Section 24 of the Constitution of the State of Indiana prohibits adoption of ex post facto laws. The Rules of the Supreme Court of Indiana have the force of law. *Miller v. Treacy*, ... Ind. ..., 108 N.E. (2d) 190 (1952). See also 9 West's Ind. Dig. 337-385, Operation and Effect of Rules and cases therein cited.

The Constitutional mandate applies to Rules of Court which have the effect of law.

16 A. C.J.S. 444-435, Ex Post Facto Laws, Definition and Nature.

The Court of Appeals ordered the State of Indiana to grant Respondent an appeal on the merits prior to adoption of the aforementioned Rule. Any interference with that mandate by subsequent adoption of rules prohibiting Respondent to obtain an appeal or release, would violate those Constitutional provisions.

III.

THE RECORD BEFORE THE DISTRICT COURT WAS COMPLETE AND AN APPEAL FROM ITS DENIAL OF THE PETITION FOR WRIT OF HABEAS CORPUS WAS WITHIN THE AUTHORITY OF THE COURT OF APPEALS

The initial Petition for Writ of Habeas Corpus was verified (A. pp. 3-8). All facts in verified petitions are assumed to be true as a Court interprets consequences resulting from its facts. The State of Indiana admits it did not controvert those facts (Pet. p. 16). Petitioner cites no authority prohibiting the Court of Appeals from reversing the District Court on the basis of the same record. Particularly is this true where the State admits it did not avail itself of an opportunity to controvert the Petition as verified.

CONCLUSION

Respondent prays the Petition be denied with such sanctions as this Court shall determine.

No matter how heavy the burden of providing counsel on appeal may be, the Petition fails to disclose error requiring the judicial supervision of this Court.

On the grounds set forth in this brief in opposition, the instant case should be permitted to rest undisturbed.

Respectfully submitted,

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